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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 146

MORTIMER W. H. COX, Administrator of the Estate of LEONA A. JACKSON, Deceased,
Petitioner,

v.

ARTHUR O. HECKER,
Respondent.

MORTIMER W. H. COX, Administrator of the Estate of LEONA A. JACKSON, Deceased,
Petitioner,

v.

ELEANORE R. WRIGHT, also known as ELEANORE R. HECKER,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

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OCTOBER TERM, 1963.

No. 1178.

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Petitioner,

v.

ARTHUR O. HECKER,

Respondent.

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Petitioner,

v.

ELEANORE R. WRIGHT, ALSO KNOWN AS ELEANORE R. HECKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of LUONGO, J., in the United States District Court for the Eastern District of Pennsylvania is reported at 218 F. Supp. 749. The opinion of MCLAUGHLIN, GANEY and SMITH, JJ., in the United States Court of Appeals for the Third Circuit has not yet been reported (see Appendix A, p. 15 Petition and Appendix).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

Whether the well established and universally accepted decisional rule requiring expert testimony to establish negligence of defendant doctors in their professional acts, by its application, deprived Petitioner of due process or equal protection of the law.

Whether the admonition to Mr. Jackson, who at the time was neither a party of record nor counsel of record for the Petitioner, to allow able counsel of record to proceed with the trial of the matter without continuous and unnecessary delays, is a deprivation of Petitioner's right to trial by jury.

STATUTES INVOLVED.

The pertinent provisions of the applicable Federal and State statutes are listed at page 4 of the Petition and quoted at length in Appendix C to the Petition, pages 19-24.

STATEMENT.

Two actions in Trespass were instituted by Petitioner as guardian (later substituted as administrator) of Leona A. Jackson, deceased, against Respondent Doctors, Hecker and Wright for alleged permanent brain damage allegedly caused by the administration of the drug chlorpromazine administered to Mrs. Jackson during an admission to the Embreeville State Hospital in 1957.

Respondent, Arthur O. Hecker, M. D., was and is the superintendent at the Embreeville State Hospital (6b). Respondent, Eleanore Wright, M. D., the wife of Arthur O. Hecker, was and is the clinical director of the same hospital (157a, 7b). In these capacities, they are state officers and employees compensated solely by a salary (6b, 7b). No medical fee of any kind was charged by the Respondents to any patient at the hospital (6b). Embreeville State Hospital is maintained in large part by the Commonwealth of Pennsylvania and is devoted exclusively to the care of patients suffering from mental diseases.

The claim in this case is based on events which occurred during an admission of Petitioner's decedent to the Embreeville State Hospital upon application by her husband, Mr. R. F. Jackson, on April 26, 1957 (74a, 2b, 3b). Prior to that time, decedent had a history of mental and physical ills dating back to the early 1940's when Mrs. Jackson was subject to periodic attacks of a state resembling catalepsis (1b, 2b). In 1952 she began to have delusions (1b), which bothered her in spells of varying severity up to her admission to Embreeville in 1957 (1b, 5b). In 1953 she had been admitted to Embreeville for approximately five months for treatment of delusions and hallucinations (2b). Mrs. Jackson had been on a diet restricting her caloric intake to control her diabetes since the fall of 1954 (3b, 4b). Control of her diabetes was difficult because she continually refused to cooperate (3b, 4b, 127a), and her

manifestations of delusional thinking gradually increased (105a, 106a). In the fall of 1955 and spring of 1956, she was treated for delusions at the Institute of the Pennsylvania Hospital with chlorpromazine (3b). She was confined to the Philadelphia Psychiatric Hospital for five weeks in 1956 (4b). In the spring of 1957, prior to her admission to Embreeville, her diabetes was difficult to control because of her refusal to follow her diet and also because of hallucinations and periods of overactivity and agitated behavior (127a).

Mrs. Jackson had arteriosclerosis, combined with diabetes and schizophrenia (139a). Arteriosclerosis could have been synergistic with diabetes in producing neurological damage, and her brain was affected (5b, 6b, 139a). She needed supervision; she could not take care of herself; her communication was on a very superficial level; and her behavior was irrational (4b, 5b, 139a, 140a).

As a patient at the Embreeville State Hospital, Mrs. Jackson was under the care and supervision of Dr. James Harris, who was at that time director of the female service at that hospital (9b). Drs. Lydia Mainero, Luis deSchut and John P. Holt were residents under his direct and immediate supervision (9b, 6a, 7a, 8a, 9a). Shortly after Mrs. Jackson was admitted to the Embreeville State Hospital, her case was discussed at a staff conference, and Dr. Harris recommended that an ataraxic drug such as chlorpromazine be used to facilitate the control of the patient's diabetes and also recommended psychotherapy (9b). Drs. Luis deSchut and Lydia Mainero thereafter ordered a routine dosage of chlorpromazine to be administered to her (7b). The patient sometime later exhibited signs of a Parkinson-like syndrome, a common and expected side effect of the drug. This side effect was purely temporary in nature and had largely cleared by August 30, 1957 (130a, 137a).

After leaving the Embreeville State Hospital on August 7, 1957, the patient was admitted to the Philadelphia

Psychiatric Hospital with condition diagnosed by her physician, Dr. Staples, as a combination of schizophrenia and cerebral arteriosclerosis (388) which, combined with her diabetes, caused a continuous deterioration in the patient. This deterioration had commenced prior to her entry to Embreeville State Hospital in 1957 and continued until her death in 1962 (146a, 155a). There is no claim in this case that there is any connection between the administration of chlorpromazine to Mrs. Jackson and her death.

The separate cases against Dr. Hecker and Dr. Wright came to trial together in December of 1962. Mr. Robert F. Jackson, surviving husband of the decedent and a member of the bar of the District Court of the Eastern District of Pennsylvania, sat at counsel table and constantly consulted with plaintiff's counsel. After two days of trial before Judge Luongo and a jury, Mr. Jackson, who had appeared to be in constant conflict with his then trial counsel over the manner in which plaintiff's case was being tried, requested the trial judge to declare a mistrial to enable him to retain other trial counsel. Because of the apparent strain of the situation upon trial counsel and because of the joinder in the Motion by plaintiff's trial counsel, Mr. Jackson's request was granted with the express understanding that the case would be reset for trial in January (70a). Subsequently, plaintiff made application for further continuance, but this application was refused by the Calendar Judge, and the two cases were tried together again before Judge Luongo and jury in February, 1963.

At this second attempt to try the cases plaintiff's two medical witnesses, who were called as experts as well as treating physicians, testified that there may have been overdosage of the drug and that confusion at one point resulted from the administration of chlorpromazine. Temporary confusion was recognized by plaintiff's experts as an anticipated side effect of the drug, and they absolved chlorpromazine as a contributing cause of any permanent confusion in Mrs. Jackson. One of the plaintiff's experts,

Dr. C. S. Stahlnecker, testified affirmatively that he had never stated that chlorpromazine caused Mrs. Jackson's condition, although Mr. Jackson had at every conference tried to make him say it (quoted in Brief for Appellees at p. 16—N. T. 347). Following a trial of five days, the jury returned verdicts in favor of both defendants. Judgments were entered and plaintiff's Motions for a new trial in each case were denied. On appeal to the Court of Appeals for the Third Circuit, the Judgements were affirmed and plaintiff's requests for rehearings were denied.

ARGUMENT.

I. The Decision Below Is Clearly Correct.

Plaintiff's contention at trial was that Mrs. Jackson suffered permanent injury following treatment with chlorpromazine. Plaintiff's medical witnesses simply could not support this contention. There is not a scintilla of evidence that Drs. Hecker or Wright or any of the treating physicians were guilty of malpractice.

Petitioner contends that Drs. Mainero and deSchut, the medical residents, did not have licenses to practice medicine in Pennsylvania. As was correctly pointed out by Judge Luongo in his opinion, a reading of the entire statute indicates that its purpose is to protect the misinformed from the hazards of mislabeling, misbranding and adulteration. It is significant that Petitioner did not offer any testimony to show that there was any deficiency in the medical training or competency of Drs. Mainero and deSchut and Holt, or that they were medically unqualified to order drugs. Petitioner does not dispute that Drs. Mainero and deSchut were graduates of an accredited medical school, that they had completed an internship, and that they were qualified in all respects to practice medicine in their own countries (72a, 10b).

Petitioner's Exhibit P-3 (19a), a letter from the Secretary of the State Board of Licensure stated that Drs. Mainero and deSchut ". . . have never been licensed to practice medicine in Pennsylvania but were granted approval by the State Board of Medical Education and Licensure for residency training in Psychiatry at the Embreeville State Hospital . . ."

No evidence was offered to attempt to show any inadequacy in their knowledge of the proper uses of the drug chlorpromazine and its anticipated side effects. The contention is solely that no license was issued to the residents

by the Commonwealth of Pennsylvania and that, therefore, Respondents Hecker and Wright are guilt of negligence as a matter of law. Petitioner's contention wholly ignores the matter of causation. It is submitted that this contention is completely untenable. Even so, Judge Luongo submitted this very issue to the jury and it was resolved in Respondents' favor.

Although Petitioner refers to chlorpromazine as a dangerous drug, there is no evidence that it *is* a dangerous drug within the meaning of the Pennsylvania and Federal Drug Acts. The Pennsylvania Dangerous Drug Act of 1955, P. L. 913, defines "dangerous drug" as follows:

> "(1) 'Dangerous drug' means a drug intended for use by man which:
>
> (a) contains any quantity of [certain drugs not in evidence in this case] or any . . . derivative thereof, which derivative has been by the Secretary of Health, after investigation . . . found to be and by regulations designated as a dangerous drug; or
>
> (b) because of its toxicity or other potentiality for harmful effect or the method of its use or the collateral measures necessary to its use, is not safe for use, except under the supervision of a practitioner, licensed by law, to administer or prescribe such drug; or
>
> (c) is limited by the Federal Food Drug and Cosmetic Act to use under the professional supervision of a practitioner, licensed by law, to administer or prescribe such drug, but shall not include any drug the sale or dispensing of which is regulated by the act of July eleven, one thousand nine hundred seventeen (Pamphlet Laws 758) . . ."

There is no evidence in this case that chlorpromazine contains any of the drugs or drug derivatives listed in Sec-

tion (a) of the statute, nor is there any evidence that the Secretary of Health has designated chlorpromazine as a dangerous drug. Further, there is no evidence that chlorpromazine is not safe for use except under the supervision of a practitioner licensed by law because of its toxicity or other potentiality for harmful effects of the method of its use.

Petitioner's witness, Dr. Staples, testified that the side effect as he observed it in Mrs. Jackson indicated a toxic reaction. This testimony is the origin of the statement appearing from time to time in plaintiff's brief to the effect that Mrs. Jackson was "poisoned" by the drug. The entire context of Dr. Staples' testimony on this point is as follows:

> "Q. (by Mr. Turner) What is meant in the profession by that name, by that term?
>
> A. 'Toxic' actually means poison. It can apply to almost any substance that is taken into the body. Alcohol, for instance, would be toxic if it were injected in sufficient quantity. There are many chemical substances which can be toxic to the body.
>
> Q. (by Mr. Turner) Is the drug chlorpromazine known to have a toxic reaction?
>
> A. Yes. I would say that any drug can have a toxic reaction, including aspirin (N. T. 371)."

Petitioner repeatedly states that chlorpormazine can kill. It is true that there is such testimony in the record, but it has been taken completely out of context. The origin of Petitioner's argument that chlorpromazine can be fatal is the testimony of Dr. Wright, which is as follows:

> "Q. (by Mr. Turner) From your knowledge of this drug chlorpromazine, it is a drug, is it not?
>
> A. Yes, sir.
>
> Q. And as such it can kill, can it not?
>
> A. There have been some suicides by chlorpromazine where people have taken exceedingly large

doses; however, of five cases that attempted suicide, that took exceedingly large doses, all recovered without injury.

Q. That is not my question, Doctor, not whether they had committed suicide. Can the drug itself—it is true I mean, that the drug itself can in instances kill an individual?

• • •

A. I would have to answer 'yes', because any drug can kill (N. T. 421)."

It is submitted that the testimony of Dr. Staples in its entirety will not support the inference made by Petitioner that chlorpromazine poisoned Mrs. Jackson, and that the entire context of Dr. Wright's testimony does not support Petitioner's inference that chlorpromazine is a fatal drug.

The provisions of the Food, Drug and Cosmetic Act, 21 U. S. C. A. 353, are very similar to those contained in the Pennsylvania statute. However, it also contains a provision in subsection (b)(1)(C) whereby a new drug application may limit the use of a drug to a licensed practitioner.

The new drug application for chlorpromazine, which became effective on April 26, 1954, is not in evidence. It is, therefore, impossible to ascertain what limitation there may be, if any, to the *use* of chlorpromazine by the terms of that application. The only indication of any limitation in the Department of Health, Education and Welfare letter offered by Petitioner into evidence at the time of trial is that there was limitation on the *sale* of the drug to a physician's prescription, again pointing out the intent of the statute which is to protect misinformed out-patients from the hazards of mislabeling, misbranding and adulteration when purchasing drugs.

II. There Is No Conflict of Decisions.

In Pennsylvania, there is a presumption against the negligence of physician treating a patient: *De Rose v. Hirst*, 282 Pa. 292, 127 A. 776 (1925). The duty imposed by law

on physicians in treatment of their patients is to employ such reasonable skill and diligence as is ordinarily exercised in their profession, giving due regard to the advanced state of the profession at the time of the treatment. *Powell v. Risser*, 375 Pa. 60, 99 A. 2d 454 (1953). The burden of proof which Petitioner must carry is that he must show that this standard has been violated and that an injury resulted thereby. Petitioner is required to offer expert testimony in support of his case. The only exception to this rule is where the common knowledge and experience of laymen would be sufficient to warrant their passing of judgment on the actions by the physician. *Demchuk v. Bralow*, 404 Pa. 100, 170 A. 2d 868 (1961).

There is no testimony in this case which establishes or which tends to prove that any of the doctors at Embreeville State Hospital did anything which was not in accordance with the standard of the medical profession. There is no medical testimony that Mrs. Jackson received too much chlorpromazine or that she received it over too long a period. On the contrary, the only evidence on this point in the case is that the administration of chlorpromazine to Mrs. Jackson was in accordance with the standard of the medical profession (154a, 7b). Mrs. Jackson received a maximum of 300 mg. of chlorpromazine a day (P-1-C). This amount of chlorpromazine is well within the approved dosage (6b, 161a).

Petitioner has miscited *Demchuk v. Bralow* as attacking the rule requiring expert testimony, when in fact the dissent in that case merely argues that when the surgeon admits that he punctured the wall of plaintiff's esophagus during the course of a surgical procedure, that this is sufficient to come within the exception to the rule. The only evidence at the trial of this case as stated above was that in fact the treatment given to Mrs. Jackson was in accordance with the standard of the medical profession so that what Petitioner asks the Court to do here is not only to find fault with a previously unchallenged rule but also to

disregard the only positive testimony in the case on this point which is in favor of Respondents.

The decisional rule requiring expert testimony is a solidly grounded rule of evidence, well established in Pennsylvania and indeed throughout the state courts. It is not in conflict with any federal rule of law.

III. The Trial Judge Acted in Accordance With the Law and Rules of Procedure.

Judge Luongo's admonition to Mr. Jackson during the course of the second trial in order to allow able counsel to proceed with the case was entirely proper. At no point during either trial of this case did Mr. Jackson appear as a plaintiff of record or counsel of record; *Arrington v. Robertson*, 114 F. 2d 821, is thus clearly distinguished. As noted by Judge Luongo in his Opinion, Mr. Jackson was in constant consultation with counsel throughout both trials. At the trial of the first case, when Judge Luongo was considering the Motion of Mr. Jackson for a mistrial, Judge Luongo made a condition of the granting of that Motion, that the case should come to trial the following month. The following month, Mr. Jackson made an application to the Calendar Judge for a further continuance of the matter, and the Calendar Judge in his discretion refused that application. In fact the second trial of this matter did not begin until some two months after the abortive first trial. As the Trial Judge stated in his opinion denying plaintiff's application for a new trial, "Decedent's husband apparently did all of the trial preparation. He had every fact, every record, every detail at his fingertips. Having prepared the case so thoroughly, he was in a position to brief new trial counsel quickly and thoroughly. Under such circumstances, a period of two months was ample time for counsel to prepare for trial. The excellent manner in which the case was tried belies the charge that plaintiff's case was prejudiced in any way by insufficient

time for counsel to prepare for trial" (71a). The admonition given to Mr. Jackson during the course of the trial to refrain from continuous delaying conferences (137a, 138a) is certainly within the discretion of the Trial Judge to maintain decorum in the courtroom.

IV. The Remaining Contentions of the Petitioner Are Without Merit.

Respondent will not reply to those allegations based on affidavits filed subsequent to the trial of the case covering mainly conversations between Mr. Jackson and other people. Likewise, no reference will be made to the contentions based on testimony in discovery depositions, which testimony was not offered in evidence at the trial.

The charge of the Court was full and fair. In an excess of consideration for the Petitioner, Judge Luongo gave in the charge considerably more than that to which Petitioner was entitled. Petitioner raised many objections to the Court's charge. It is submitted that these points represent only distortions, innuendoes, and inferences made by the Petitioner. As an example of Petitioner's Complaint, the following is quoted from page 31 of Petitioner's Brief in the Court of Appeals:

> "The Court cautioned the jury not to decide the case out of sympathy, pity or prejudice (38a, 40a). This implies sympathy or pity for the deceased or survivors and prejudice against doctors. He omitted the converse (40a)."

The foregoing quote sets the tenor of Petitioner's objections to the charge and the alleged errors in the conduct of the trial. It is submitted that there was no error in the trial of the case, in the charge, or any error whatever which would require review of the appellate court's disposition of this twice-tried case.

CONCLUSION.

It is submitted that the issues presented in this case are not properly the subject of review by the Supreme Court of the United States, in that there is no conflict in any of the decisional rules applied between the Third Circuit and any other Circuit; there is no conflict between federal or state statutes; no statute has been held to be unconstitutional; there is no peculiar importance to this case above and beyond the importance that any serious case has to the particular litigants and parties in interest; the subject in controversy is a non-federal matter; and finally, the decision was correct.

Respectfully submitted,

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